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In The

Supreme Court of The United States

OCTOBER TERM 1992

ASSOCIATED BUILDERS AND CONTRACTORS, INC.; ASSOCIATED GENERAL CONTRACTORS OF ALASKA; IRBY CONSTRUCTION CO.; IRBY/ALASKA UTILITIES CONSTRUCTION CO.

Petitioners,

vs.

CITY OF SEWARD, an Alaska own rule municipality; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, a labor union,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 21, 1992

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QUESTION PRESENTED

Whether a governmental municipality is prohibited by the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*, from interfering with the process of collective bargaining in the private sector by requiring private construction employers to sign collective bargaining agreements with a union as a precondition of performing government work.

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Petitioners pray that a writ of certiorari issue to review the opinion and order of the Court of Appeals for the Ninth Circuit, rendered in this proceeding on June 5, 1992. A petition for rehearing en banc was denied by the Ninth Circuit on July 24, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 966 F.2d 492 (9th Cir. 1992) and is reproduced, together with its order denying Petitioner's request for a rehearing en banc, in the Petitioner's Appendix ("Pet. App.") at A1-A20. The order of the United States District Court

for the District of Alaska, which was issued after an oral hearing on the matter, is unreported and is reproduced at A21-A22.

JURISDICTION

Jurisdiction in the United States District Court was premised on 28 U.S.C. §§ 1331, 1337, 1343 and 2201, based on causes of action arising under 15 U.S.C. § 1, 29 U.S.C. § 151, 42 U.S.C. § 1983 and the United States Constitution. Jurisdiction in the Court of Appeals was premised on 28 U.S.C. §§ 1291 and 1292(a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 152:

> "When used in this subchapter —
>
> * * *
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or an wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, . . ."

29 U.S.C. § 158:

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply

to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, which ever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any

agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title."

STATEMENT OF THE CASE

A. Facts

The City of Seward (herein the "City") is an Alaskan municipality with a population of approximately 2800 persons, located 130 miles from Anchorage.[1] The City operates the Seward Electrical Utility System, which provides commercial and residential electrical service within its allocated service territory. During the 1990 legislative session, the City requested and received from the Alaskan Legislature a grant of $9.5 million for construction of a 24-mile 115 Kv transmission line — the Project. 208 SLA 1990, 144. The City accepted this grant by Resolution 90-086. On July 23, 1990, the State of Alaska and the City entered into a "Standard Agreement Form for Municipal Grants" for $9.5 million for the construction of the electrical line and attendant structures.[2] This grant was supplemented by over $5 million in City general obligation bond funds.

On October 8, 1990, the City issued a "Request for Contractors to Pre-Qualify" to bid on the project.[3] The request included the following language (hereinafter referred to as the "IBEW signatory requirement"):

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[1] The parties stipulated to all of the relevant facts in this matter at the district court level.

[2] The grant agreement states: "Signing of this agreement does in no way excuse the recipient of the municipal grant of any other law, Alaska State Statute or City code regulations. Recipient must in all cases consult and adhere to all local, State, or Federal laws that pertain to public funds."

[3] "Pre-qualification" is a process which allows the owner of a construction project to determine each bidder's competency and responsibility to satisfactorily complete the project before the bidder submits a bid.

> The City of Seward is a signatory to a collective bargaining agreement with the International Brotherhood of Electrical Workers (IBEW), Local Union 1547. In order to preserve work traditionally performed by employees represented by the IBEW and to avoid the destruction of wages, hours, and conditions of employment achieved through the collective bargaining process, the City has agreed that, to the extent permitted by law, it will not contract, or allow the subcontract, for the construction of the 115 Kv main electrical transmission intertie line between Lawing and Fort Raymond subdivisions within the City of Seward for work traditionally performed by the IBEW except to a party with an appropriate current labor agreement with the IBEW. The Request for Pre-Qualification shall . . . address each of the following subjects. . . .
>
> 6. A statement attesting that the contractor is a party to an appropriate current labor agreement with the IBEW that will assure that work traditionally performed by employees represented by the [IBEW] will be performed by such workers.

The Request made reference to a "Letter of Agreement" dated May 2, 1990 between the City and the IBEW, in which the City agreed to impose the IBEW signatory requirement "to the extent permitted by law."

In October of 1990, both Irby and Irby/AUC[4] submitted separate requests to be prequalified to bid on the Project. In their

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[4] Irby\AUC is a joint venture which combines the experience and assets of Irby Construction Company with the Alaskan construction experience of Alaska Utility Construction, Inc. Associated Builders and Contractors, Inc. ("ABC") is a trade association representing over 18,000 "merit shop" construction industry employers. Associated General Contractors of Alaska ("AGCA") is an Alaskan non-profit organization whose members are both union and non-union Alaskan construction industry employers.

respective requests, both companies expressed concerns regarding the IBEW signatory requirement. On November 16, 1990, Everett Diener, Manager of Engineering and Utilities for the City, wrote letters to officials of Irby and Irby\AUC, requesting additional information concerning the companies' Alaska experience and the identity of key employees each would have on the Project. Diener also noted each companies' objection to the IBEW signatory requirement, stated that he would likely recommend to the City Council that they be found not qualified to submit bids, and invited the companies to change their responses to Item #6.

In November 1990, both companies submitted the requested information to the City, but neither accepted the City's invitation to change its position with respect to the IBEW signatory requirement. On November 30, 1990, Diener sent a letter to Irby stating, *inter alia*,

> We find you qualified to perform except for Item #6 which states that you must be a party to a current labor agreement with the IBEW. Consequently, I have no alternative but to omit your company from the list of contractors I will submit to the City Council as qualified bidders on this project. Therefore, if the City Council approves the recommendation a bid will not be accepted from Irby Construction Company.

The City's December 3, 1990 response to Irby\AUC was substantially the same.

On November 30, 1990, Diener sent a memorandum to the City's Mayor and City Council, finding Irby and Irby\AUC not to be qualified for failure to comply with the requirement of a current labor agreement with the IBEW. On December 10, 1990, the City Council adopted Resolution 90-152, which approved the list of bidders, omitting Irby and Irby\AUC.

Irby and Irby\AUC are in all respects fully qualified, in terms of skill, knowledge, and experience, to construct the Project, having been found so by the City's designated representative. The sole basis for the City's refusal to pre-qualify Irby and Irby\AUC is their lawful decision not to enter into a collective bargaining agreement with the IBEW, where the IBEW has not been certified by the National Labor Relations Board as the legal representative of Irby's or Irby\AUC's employees.

B. Procedural History

On December 28, 1990, the Petitioners filed a complaint in Federal District Court against the City and the IBEW in connection with the City's refusal to pre-qualify them to bid on the Project. The complaint challenged enforcement by the City, a governmental agency, of the IBEW signatory requirement. Petitioners did not seek to halt the construction of the power lines or to delay the award of the Project contract. Nor did Petitioners seek an order enjoining the entire bid pre-qualification process. Rather, they asked only that the district court declare the IBEW signatory requirement to be unlawful, as an unwarranted interference with the collective bargaining process of private employers, and to permanently enjoin the enforcement thereof.

On January 28, 1991, Petitioners filed a motion for summary judgment, or in the alternative, for a preliminary injunction. Respondents opposed these motions and the IBEW made a cross-motion for summary judgment. On March 19, 1991, a hearing was held before the Honorable Andrew J. Kleinfeld, United States District Judge for the District of Alaska, with regard to the parties' motions. After hearing oral arguments, the District Court denied Petitioners' motions from the bench and granted summary judgment for Respondents. *See* Pet. App. A21.

On April 18, 1991, Petitioners filed their notice of appeal to the Court of Appeals for the Ninth Circuit, challenging the District Court's denial of their motions, as well as the District Court's decision to grant summary judgment to Respondents. In particular, Petitioners argued that the IBEW signatory requirement forces private employers to enter into a governmentally dictated collective bargaining relationship with the IBEW in order to perform government work, in direct contradiction to the precedents of this Court and other circuit courts of appeals. Petitioners contended that such a requirement unlawfully intrudes into areas of labor law which Congress has indicated should be left free from governmental interference under the National Labor Relations Act (herein "NLRA") and are therefore preempted from local government regulation, regardless of whether a government claims to be acting as a "market participant."

On June 5, 1991, a divided panel of the Ninth Circuit issued an opinion rejecting Petitioners' NLRA preemption claim. In doing so, the Court attempted to distinguish the contrary holdings of the First and Eighth Circuits, on the ground that the union signatory requirement in this case was imposed pursuant to a "work preservation" agreement between the City and the IBEW within the meaning of the NLRA. *See* Pet. App. A9.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S CONCLUSION THAT THE RESPONDENT'S SIGNATORY REQUIREMENT DOES NOT INTERFERE WITH THE PROCESS OF COLLECTIVE BARGAINING IN THE PRIVATE SECTOR IS IN SHARP CONFLICT WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

This case involves the enforcement of a pre-hire agreement, whereby a governmental agency is attempting to force private, non-union contractors to enter into a binding labor agreement with a particular labor union, in this case the IBEW, as a precondition to bid on a public construction project. Numerous decisions of this Court and other courts of appeals have established that such a requirement unlawfully intrudes into areas of labor law, namely the collective bargaining process, which Congress has determined should be left free from governmental interference under the NLRA.

As detailed below, the First and Eighth Circuits have, under virtually identical facts, reached a conclusion opposite to the Ninth Circuit's holding in this case, expressly relying upon this Court's decisions in this area. *Associated Builders and Contractors v. Mass. Water Resources Auth.*, 935 F.2d 345 (1st Cir. 1991), *cert. granted sub nom, Building and Construction Trades Council v. Associated Builders and Contractors*, No. 91-261, 91-274; *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991). On the other hand, the Sixth Circuit has taken a position which is inconsistent with the First Circuit's holding. *Phoenix Engineering, Inc. v. M-K Ferguson of Oak Ridge Co.*, 966 F.2d 1513 (6th Cir. 1992). Thus, the federal courts simply do not agree on whether this type of government intrusion into the area of labor relations is permitted under this Court's precedents. The decision of this Court to grant the writ

of certiorari in the *Boston Harbor* case establishes beyond peradventure the importance of the present issue. It is vital that the contrary holding of the Ninth Circuit not be allowed to have precedential effect, pending the outcome of the *Boston Harbor* appeal.[5]

This Court has held that state and local governments are prohibited from regulating activities which Congress has intended to be left unrestricted from any governmental power. *Lodge 76, Int'l Assoc. of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm.*, 427 U.S. 132, 140 (1976). This type of federal preemption, announced in *Machinists*, was relied upon and expanded in the *Golden State* cases. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*).

In *Golden State I*, the employer sought renewal of a taxicab operating license from the City of Los Angeles. At the time the employer was engaged in a labor dispute with the union that represented its employees. The City Council conditioned renewal of the franchise on settlement of the labor dispute by a specific date. When the strike was not settled by that date, the franchise expired. This Court ruled that the city's action in conditioning renewal of the franchise on settlement of the labor dispute was preempted by the NLRA. The Court held that the city's actions constituted an attempt to regulate the collective bargaining process, which Congress intended to be left unregulated by any governmental party. Thus, in *Golden State I*, this Court squarely held:

> Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA. . . .

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[5] Oral argument is scheduled in the *Boston Harbor* case on December 9, 1992.

> Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations. . . . A local government, as well as the National Labor Relations Board, lacks the authority to "introduce some standards of properly 'balanced' bargaining power . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."

475 U.S. at 619 (citations omitted).

In *Golden State II*, which upheld the award of compensatory damages under the NLRA and 42 U.S.C. §1983, the Court made even more explicit its ruling prohibiting governmental interference in the process of private sector collective bargaining. In language apparently ignored by the Ninth Circuit, the Court stated:

> . . . Congress intended to give parties to a collective bargaining agreement the right to make use of "economic weapons," not explicitly set forth in the Act, free from governmental interference. "[T]he Congressional intent in enacting the comprehensive federal law of labor relations" required that certain types of peaceful conduct "must be free of regulation." The *Machinists* rule creates a free zone from which all regulation "whether federal or state" . . . is excluded.

493 U.S. at 111. (citations omitted).

Finally, so that there could be no doubt as to the protection of private sector collective bargaining rights from governmental interference, the Court added:

> The *Machinists* Rule is . . . akin to a rule that denies either sovereign the authority to abridge a personal liberty . . . [T]he interest in being free of government regulation of "the peaceful methods of putting

> economic pressure on one another" . . . is a right specifically conferred on employers and employees by the NLRA.

Id. at 112. The Court concluded that the *Machinists* preemption rule "is a guarantee of freedom for private conduct that the state may not abridge." *Id.*

In the present case, contrary to the Ninth Circuit's claims, the City's intrusion into the process of collective bargaining is as direct and unlawful as the actions which were found to be prohibited in the *Golden State* cases. The City has flatly declared that it will refuse to allow contractors to perform work on government construction projects if such employers fail to subject themselves to agreement with a union, the IBEW. Such governmental intrusion into the process of private collective bargaining is prohibited by federal law and should have been enjoined by the Court of Appeals.

The result in the present case is in sharp conflict with the decision of the First Circuit Court of Appeals, sitting *en banc*, in *Associated Builders and Contractors v. Mass. Water Resources Auth.*, 935 F.2d at 345. In that case, the Court of Appeals applied the *Golden State* doctrine to a governmentally enforced project labor agreement similar in all material respects to the IBEW signatory requirement at issue in the present case. There, a private construction manager hired by a governmental authority, the MWRA, negotiated a "union only" project labor agreement on the government's behalf. The effect of the government's project bid specifications enforcing the "union only" agreement in *Boston Harbor*, as in *Seward*, was to restrict access to work on the government's construction project solely to those contractors who agreed to be bound by union contracts with a particular union.[6]

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[6] The language of the "union only" clause provided that: "[E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of

The First Circuit properly found this type of governmental interference with the collective bargaining process to be squarely prohibited by the NLRA. As the court unequivocally held, the imposition of a "union only" project labor agreement as a condition for the performance of government work constitutes "pervasive" intrusion into the bargaining process: "The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be. For all intents and purposes the state here *eliminates* the bargaining process altogether." 935 F.2d at 353. Finding *Golden State* to be directly applicable, the court enjoined enforcement of the project labor agreement as a condition for the award of work on the government-funded construction project. *Id.* at 360. As noted above, the Eighth Circuit reached the same result, again in conflict with the Ninth Circuit, in *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991).

In the present case, the Ninth Circuit acknowledged that *Boston Harbor* "does indeed share certain similarities with this case." Pet. App. A11. The court then attempted to distinguish *Boston Harbor* solely on the basis that "the MWRA . . . did not act out of its concerns as a public employer; unlike the City of Seward, it did not employ workers who had traditionally performed the work that would be contracted out." *Id.* The court thus considered it to be "crucial" that the union signatory requirement here was imposed pursuant to a "work preservation" clause between the City and the union representing the City's own electrical employees, who would concededly *not* be performing the work in question. *Id.* at A12.

The court's reliance on the City's so-called work preservation clause as a basis for permitting it to interfere with the

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the ["Master Labor Agreement"] . . . and will be bound by the provisions of that agreement in the same manner as any other provision of the contract." 935 F.2d at 347-48.

collective bargaining rights of other employers is entirely misplaced. As the dissent recognized, under federal law, the City was free to negotiate anything it wanted with its own employees as to their own terms and conditions of employment, because under the NLRA, 29 U.S.C. § 152(2), states and political subdivisions are excluded from the definition of "employer." *Id.* at A13. Thus, if the City were the actual employer of the Project laborers, the NLRA would be totally inapplicable and the issue of preemption would not have arisen. The City is *not* the employer on this project, however, but is unlawfully seeking to coerce private contractors who *are* employers into signing union agreements.

Moreover, contrary to the majority's unsupported view, decisions of this Court and other circuit courts of appeals have squarely held that clauses similar to the agreement negotiated between the City and the IBEW do not constitute valid "work preservation clauses" within the meaning of the NLRA, even when entered into by private employers. Thus, the linchpin of the majority's opinion, that the union-only requirement was imposed pursuant to an "otherwise valid work preservation clause," is simply wrong and must be overruled.

This Court articulated the concept of "work preservation" agreements in the case of *National Woodwork Manufacturers Assoc. v. NLRB*, 386 U.S. 612 (1967). There, the Court held that a "will not handle" clause was designed to protect and preserve work customarily performed by bargaining-unit employees, rather than to effect a secondary boycott of products produced by other employers. The National Labor Relations Board and the courts have found, however, that clauses purporting to reserve work traditionally performed by bargaining unit employees nevertheless violate Section 8(e) when affected work has not actually been previously performed by employees in the unit. The Ninth Circuit itself has expressly limited the validity of so-called work preservation clauses pursuant to the "right-to-

control" doctrine. As stated in *Associated General Contractors of Calif., Inc. v. NLRB*, 514 F.2d 433, 439 (9th Cir. 1975):

> A union's right to enforce a work preservation clause against an employer may extend only to work which is his to assign. When it is applied to work beyond the employer's power to give, a work preservation clause necessarily embodies a prohibited secondary objective.

This analysis was subsequently cited with approval in this Court's decision in *NLRB v. Enterprises Assoc. of Pipefitters*, 429 U.S. 507, 527 n.15 (1977) ("The Board has continued to interpret and apply Section 8(b)(4)(B) to find an unfair labor practice, at least where the union employs a product boycott to claim work that the immediate employer is not in a position to assign.") *See also George Koch Sons, Inc. v. NLRB*, 490 F.2d 323 (4th Cir. 1973).

In the present case, it was undisputed that the City did not have the heavy equipment necessary to perform the particular transmission line repair work at issue. Pet. App. A12 n.4. Indeed, that is why the City was compelled to subcontract out the work to the private sector. By definition, therefore, the City's employees could not be said to have traditionally performed this work, because, lacking the necessary equipment, they had *never* performed it. *See Carrier Air Cond. v. NLRB*, 547 F.2d 1178 (2d Cir. 1978). Finally, the majority erred in relying on the assertion that "if Seward had had the heavy equipment necessary," it would have used its own employees. Pet. App. A12 n.4. As the NLRB held in *Plumbers and Steamfitters Local*, 225 NLRB 1364, 1367 (1976), it is irrelevant that unit employees are "capable of performing the work in issue." A clause is not a valid work preservation clause if the unit employees have not *actually* performed the work.

In short, the majority's artificial distinction based on work preservation concepts applicable to the private sector does not

withstand scrutiny and provides no basis whatsoever for a local government to interfere in the process of private collective bargaining by forcing employers into an agreement with a particular union.

In any event, as noted above, it does not follow that because the City has the right to deal with its own employees outside the strictures of the NLRA, that it therefore has a license to interfere with the collective bargaining rights of *private* employers. The City was not the employer of the Project laborers in this case, which is a necessary incident of the fact that it decided to contract out the construction project in the first instance. The City, therefore, cannot use the state "employer" exemption as a shield against NLRA preemption. Rather, in the same manner as the MWRA in *Boston Harbor*, the City is acting "in its common role as a third party purchaser." 935 F.2d at 355. As the First Circuit tellingly observed, if the state employer exemption from the NLRA is consistently interpreted in this fashion, to include any case in which a governmental body contracts for goods or services,

> the exception would likely swallow the rule. Allowing a state to impose restrictions on *all* companies from which it purchases goods and services would effectively permit it to regulate labor relations between private employers and their employees thus totally displacing the NLRA . . . Indeed, an anti-union state government could allow only non-union employers to bid on state projects, if the state-as-employer argument is taken to its extreme.

Id. [7]

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[7] It is significant that the U.S. Solicitor General, though he has argued against the First Circuit's decision in the *Boston Harbor* case, nevertheless has conceded that the present position of the Ninth Circuit poses a direct conflict. The Solicitor General expressly rejected the Ninth Circuit's claim that the so-called "work preservation" aspects of the City's conduct are

In further support of its application of the state employer exemption to the facts of this case, the Ninth Circuit also erred by arguing that the rules for public and private employers are the same: "In light of section 2(2), we fail to see how Congress could have intended to prohibit a public employee from agreeing to a work preservation clause to which a private employer is free to agree." Pet. App. A11. However, the fact that a private construction employer might arguably be entitled to require union-only subcontracting pursuant to an agreement with its own employees is entirely irrelevant.[8] Again, the First Circuit explicitly rejected this argument, stating that "Congress is perfectly capable of distinguishing between states and private parties" as it has done in this context. 935 F.2d at 358. *See also Glenwood Bridge, Inc., supra*, 940 F.2d at 371 (holding that Sections 8(e) and (f) of the NLRA do not grant public employers the ability to enter into pre-hire agreements).

In *Wisconsin Dept. of Ind. v. Gould, Inc.*, 475 U.S. 282, 290 (1986), this Court itself underscored the importance of the state/private distinction:

> [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. . . . The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. The Act treats state action differently from private action not merely because they frequently take dif-

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distinguishable in any principled way from the *Boston Harbor* facts. *See* Brief of the United States as Amicus Curiae in *Building Trades Council v. Associated Builders and Contractors*, No. 91-261, 91-274, at 24 n.17.

[8] Sections 8(e) and (f) of the Act, 29 U.S.C. §§ 158(e) and (f), create an exception for "construction industry employers" (and only such employers) by allowing certain actions, such as a pre-hire agreement with a union, which would otherwise be prohibited as unfair labor practices, subject to certain limitations. *See Boston Harbor*, 935 F.2d at 355-56.

> ferent forms, but also because in our system States simply are different from private parties and have a different role to play.

See also Golden State I, 475 U.S. at 614 ("The NLRA . . . has long been understood to protect a range of conduct against state but not private interference."). Thus, the *Boston Harbor* court rightly concluded that "it is plain that the private employer comparison merits little weight. The MWRA [like the City of Seward] is an arm of the state, and its acts must be judged accordingly." 935 F.2d at 358.[9]

It is simply no excuse then, that the IBEW signatory requirement could be lawfully enforced if only its effects were not felt outside the City's own workforce. Here, the City chose to contract with private employers to build its Project, rather than attempting to use its own employees to perform the work. Having made this choice, the City is precluded from interfering with the protected liberties of independent private employers in a manner prohibited by federal law. As Judge Wright said in dissent below, "[i]n short, when a State acts as a public employer, it should be bound to confine its regulatory function to its own current and future employees." Pet. App. A17.

The Ninth Circuit also sought to distinguish *Boston Harbor*, as well as *Golden State* and *Gould*, on the basis that the City, acting as a "market participant," was not motivated by the desire to use its market power to regulate private sector labor relations, but "by legitimate management concerns." *Id.* at A10. This distinction, however, completely misconstrues the bases of these decisions, which rest upon whether interference in the collective bargaining process by the state is "direct," rather than on the motivation for the interference. Thus, the *Boston Harbor*

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[9] As the First Circuit also correctly noted, the entire Bill of Rights and many federal statutes impose restrictions exclusively on governmental, as opposed to private, actors. 935 F.2d at 358 n. 26.

court held that "where interference into the collective bargaining process by the state is *direct*," rather than "peripheral" to federal labor policy, no "asserted state interest . . . whether 'proprietary' or otherwise," can justify the interference. 935 F.2d at 359. Likewise, in *Golden State I*, once the Court had determined that direct interference with the collective bargaining process had occurred, it explicitly found that the state's motives for bringing about the interference were irrelevant. 475 U.S. at 617-18 n.8 (rejecting argument that City was acting to protect its public transportation needs).

Finally, the Ninth Circuit's opinion has utterly misread this Court's decision in *Gould*, transforming a case which rejected the regulatory/market participant distinction into an opinion which would somehow broadly exempt state action from NLRA preemption. In *Gould*, the Court struck down a state statute barring repeat violators of the NLRA from bidding on state contracts as preempted under the *Garmon* preemption doctrine. 475 U.S. at 291. The state argued that it should not be restricted by the Commerce Clause when it acts as a market participant. The Court rejected this argument, noting that "[t]he NLRA, . . . was designed in large part to 'entrust administration of the labor policy for the Nation to a centralized administrative agency.'" *Id.* (citations omitted).

While the Court in *Gould* allowed a limited exception for matters of peripheral concern to the NLRA, the *Boston Harbor* court correctly stated that this exception "largely restates the *Garmon* proposition: Some state interference into the collective bargaining process is permitted if it, first, is 'peripheral' to federal labor policy, or, second, pertains to matters 'deeply rooted in local feeling and responsibility.'" 935 F.2d at 359 (citations omitted). However, as stated above, the IBEW signatory requirement is a direct regulation of the collective bargaining process and thus cannot be termed either "peripheral" or "local." Moreover, the fact that the City here has acted

through its bidding regulations rather than its general law is irrelevant, as "judicial concern has necessarily focused on the nature of the activities which the states have sought to regulate, rather than on the method of regulation adopted." *Golden State I*, 475 U.S. at 614 n.5.

Thus, the Ninth Circuit's decision directly conflicts with the *Boston Harbor* holding, and the related decisions set forth above, on an issue which this Court has already determined to be of substantial importance. For the same reasons, the Court should grant the present petition and/or at least hold it in abeyance for possible remand in accordance with the outcome of the *Boston Harbor* case.

CONCLUSION

For the foregoing reasons, Petitioners pray that the Court issue a writ of certiorari to review the decision and judgment below.

Respectfully submitted

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Rule 29.1 Statement. None of the Petitioners has either parent or subsidiary corporations.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATED BUILDERS AND CONTRACTORS, INC., et al.,
Plaintiffs-Appellants,

v.

CITY OF SEWARD, an Alaska own rule municipality; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Union 1547 (IBEW), a labor union,
Defendants-Appellees.

No. 91-35511

D.C. No. KCV-91-001-AJK

Appeal from the United States District Court
for the District of Alaska
Andrew Kleinfeld, District Judge, Presiding

Argued and Submitted
January 7, 1992 Seattle, Washington
Filed June 5, 1992

OPINION

Before: Eugene A. Wright, William A. Norris, and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Norris; Dissent by Judge Wright

SUMMARY

Labor and Employment/Collective Bargaining/Unions

Affirming a district court grant of summary judgment, the court of appeals held that the NLRA did not preempt a city's actions requiring a successful public contract bidder to have a labor agreement with a union because such requirement was imposed pursuant to a valid work prevention clause in a collective bargaining agreement covering the city's electrical employees.

Appellant Associated Builders and Contractors, Inc. and other trade associations representing construction industry contractors (contractors) sought to enjoin the enforcement of a work preservation clause adopted by the City of Seward, Alaska, and the union representing the city's electrical employees limiting bidding on a renovation project to contractors who agreed to enter into a labor agreement with the union to cover that project. The contractors maintained that the clause was preempted by the NLRA, violated the antitrust laws, and operated to deny them equal protection and due process of law. The district court granted summary judgment for the city.

[1] Under *Golden State*, a city may not regulate the collective bargaining activities of private employers merely because they do business in the city. However, the court noted that in this case, the city was not exercising its regulatory power, but rather was exercising its power as a market participant. Thus, no conflict between state regulation and federal regulation authority could arise. **[2]** *Gould* stood as authority for the idea that action taken by a state as a market participant is not automatically immune from NLRA preemption. **[3]** Thus, the court inquired whether the work preservation clause at issue had the sole purpose of regulating conduct that Congress intended to be unregulated or whether another purpose could credibly be ascribed to the union signatory requirement. **[4]** The court

concluded that the city was not driven by regulatory concerns, but by legitimate management concerns that could lead any employer, public or private, to agree to a work preservation clause. **[5]** The court failed to see how Congress could have intended to prohibit a public employee from agreeing to a work preservation clause to which a private employer is free to agree. **[6]** The fact that the city would not be the actual employer of the workers on the renovation project was irrelevant, so long as the city acted in its capacity as a public employer in enforcing the terms of a valid work preservation clause in its CBA with the union. **[7]** Accordingly, the court held that the NLRA did not preempt the city's actions requiring the successful bidder to have an agreement with the union because the requirement was imposed pursuant to a valid work preservation clause in a CBA covering the city's electrical employees.

[8] Because the city and the union had entered into an agreement permitted by law, it would be inconsistent to approve such an agreement under labor law, but strike it down under antitrust law. Accordingly, the court held that the Seward work preservation clause was immune from antitrust liability. **[9]** Neither did the city's enforcement of the terms of the work preservation clause violate the Equal Protection Clause of the fourteenth amendment. **[10]** The Due Process Clause was also not violated because as wishful bidders the contractors had no constitutionally protected property interest in the city's power line renovation project.

Dissenting, Judge Wright stated that were the city the employer, there would be no problem agreeing with the majority's conclusions. However, Judge Wright failed to see how the city's relationship with its own employees justified its intrusion into the labor relationships between prospective contractors and their employees.

COUNSEL

Maurice Baskin, Venable, Baetjer, Howard & Civiletti, Washington, D.C.; Stephen M. Ellis, Delaney, Wiles, Hayes, Reitman & Brubaker, Inc., Anchorage, Alaska, for the plaintiffs-appellants.

Helen M. Antel, IBEW Local Union 1547, Anchorage, Alaska, for the defendants-appellees.

OPINION

NORRIS, Circuit Judge:

The City of Seward ("Seward") owns and operates its own electric utility. Seward has a Collective Bargaining Agreement ("CBA") with the International Brotherhood of Electrical Workers ("IBEW"). In 1990, Seward received a grant from the Alaska legislature to replace an old high voltage electric transmission line. Although Seward has traditionally relied on its own employees to do the work on improvements in its electrical system, in this case it decided to contract out the transmission line renovation project to a private contractor. The primary reason for doing so was that Seward lacked the heavy construction equipment needed to do the job.

To protect the interests of the Seward employees represented by the IBEW, the union negotiated with Seward to add a work preservation clause to the CBA. The clause limits bidding on the renovation project to contractors who agree to enter into a labor agreement with the IBEW for purposes of this project.[1]

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[1] The work preservation clause reads as follows:

> The City of Seward ("the Employer") agrees that, to the extent permitted by law, (including 29 U.S.C. § 158(e)), it will not contract for or allow the subcontract for the construction of the 115 kv main electrical transmission intertie line between Lawing and Fort. Raymond [substations] for work traditionally performed by employees represented by the International Brotherhood of Electrical Workers,

Trade associations representing construction industry contractors ("Contractors") filed this action seeking to enjoin the enforcement of the work preservation clause. The Contractors maintained the clause is preempted by the National Labor Relations Act (NLRA), that it violates the antitrust laws, and that it operates to deny the Contractors equal protection and due process of law.

Ruling on stipulated facts, the district court granted summary judgment to Seward and the IBEW. The Contractors appeal. We review a summary judgment *de novo*. *See Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989).

I

We first address the Contractors' preemption argument that the NLRA prohibits Seward from enforcing the work preservation clause in its CBA with the IBEW.

In *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), the Supreme Court summarized its NLRA preemption case law. The Court said:

> Last Term, in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), we again noted: "The Court has articulated two distinct NLRA preemption principles." The first, the so-called *Garmon* preemption prohibits States from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits." The *Garmon* rule is intended to preclude state interference with the National Labor Relation Board's interpretation and active enforcement of the "integrated scheme of regulation" established by the NLRA.

Local Union 1547 ("IBEW") except to a person, firm, or corporation that is a party to an appropriate current labor agreement with IBEW.

> [T]he second, . . . the so-called *Machinists* preemption . . . precludes state and municipal regulation "concerning conduct that Congress intended to be unregulated." Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left" 'to be controlled by the free play of economic forces.'" The Court recognized in *Machinists* that ... Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance " 'between the uncontrolled power of management and labor to further their respective interests.' "

Id. at 613-14 (citations omitted).

Citing *Golden State*, the Contractors argue that the work preservation clause in Seward's CBA triggers the so-called *Machinists* preemption principle which the Court found applicable in *Golden State*. In *Golden State*, the employees of a privately-owned taxi cab company were on strike when their employer's cab franchise came up for renewal by the City of Los Angeles. The city council refused to renew the franchise unless the cab company settled the strike by a certain date. The strike was not settled and the franchise expired. The cab company sued the city on the ground that the city's conditioning the renewal of the franchise on the settlement of the strike constituted an impermissible attempt to regulate conduct that Congress intended to be unregulated.

Invoking the *Machinists* preemption doctrine, the Supreme Court agreed. The Court said that the NLRA "leaves the bargaining process largely to the parties," *id.* at 616, and that "[t]he parties' resort to economic pressure [in this case] was a legitimate part of their collective-bargaining process." *Id.* at 615. The Court went on to observe that "the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help." *Id.* Because

"[p]rotecting the free use of economic weapons during the course of negotiations was the rationale for [the] finding[ ] of preemption in *Machinists*, the Court held the city's action was preempted by the NLRA. *Id.* at 617.

Here, the Contractors argue that, just like the City of Los Angeles in *Golden State*, the City of Seward impermissibly regulated private sector collective bargaining when it enforced the terms of the work preservation clause against private contractors. In response, Seward and the IBEW argue that the Contractors overlook the critical fact that this case, unlike *Golden State*, involves action taken by a city in its capacity as a public employer to enforce the terms of a valid work preservation clause in a collective bargaining agreement that covers its own electrical employees. Relying in part on Congress' exemption of public sector collective bargaining from the coverage of the NLRA, *see* 29 U.S.C. §152(2), Seward and the IBEW contend that the NLRA does not preempt the action Seward took in its capacity as a public employer.

A

[1] *Golden State* is clear authority for the proposition that a city may not regulate the collective bargaining activities of private employers merely because they do business *in* the city. In *Golden State*, the Supreme Court held that the NLRA barred the City of Los Angeles from using its power to franchise taxi cab companies to influence the bargaining process between a cab company and its employees. In that sense, the Contractors are correct that the City of Seward cannot use its regulatory power to influence private sector collective bargaining. In this case, however, Seward was not exercising its regulatory power, but rather was exercising its power as a market participant. Seward did not require all contractors doing business in the city to have a collective bargaining agreement with the IBEW; rather it only required the successful bidder on the city's power line renovation project to have such a contract. This is an important

distinction for the purpose of applying the NLRA preemption doctrine. As the Supreme Court has explained in the Commerce Clause context, "[w]hen the State acts solely as a market participant, no conflict between state *regulation* and federal regulatory authority can arise." *United Building and Construction Trades Council of Camden County v. City of Camden*, 465 U.S. 208, 220 (1984) (emphasis in original).

The fact that Seward was acting as a market participant, however, does not end the preemption inquiry. In *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986), the Court recognized that in some circumstances state action as a market participant could run afoul of the NLRA.

In *Gould*, the Court considered whether the NLRA preempted a Wisconsin statute prohibiting state procurement agents from purchasing any products manufactured or sold by a company that repeatedly violated the NLRA. *Id.* at 283-84. In the course of its analysis, the Court rejected Wisconsin's argument that its procurement statute was not subject to preemption analysis because it constituted "an exercise of the State's spending power rather than its regulatory power." *Id.* at 287. The Court reasoned, "That seems to us a distinction without a difference, at least in this case, because on its face the debarment statute serves plainly as a means of enforcing the NLRA." *Id.*

[2] *Gould* thus stands as authority for the idea that action taken by a state as a market participant is not automatically immune from NLRA preemption. In deciding that the Wisconsin procurement policy constituted an impermissible effort to use the state's purchasing power to regulate private sector labor relations, the Court in *Gould* looked to the state's purpose in adopting the policy. The Court specifically relied both on the state's concession "that the point of the statute is to deter labor law violations and to reward 'fidelity to the law,'" *id.*, and on its own observation that "[n]o other purpose could credibly be

ascribed [to the statute.]" *Id.* Because the Wisconsin policy served the sole purpose of enforcing the NLRA, the Court determined that "for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation," *id.* at 289, and hence subject to NLRA preemption analysis.

In *Gould*, the Court went on to limit the reach of its holding that the Wisconsin procurement policy was an impermissible attempt to regulate private sector labor relations: "We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations." *Id.* at 291. It added, "We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States." *Id.*

B

[3] In this case, the City of Seward acted as a market participant when it required the winning bidder on its power line renovation project to comply with the terms of the work preservation clause in the city's collective bargaining contract with the IBEW. In deciding whether Seward's action constituted an impermissible effort to use its market power to regulate private sector labor relations, we focus our inquiry on the question whether the work preservation clause had the sole purpose of regulating conduct that Congress intended to be unregulated or whether "[an]other purpose could credibly be ascribed [to the union signatory requirement.]" *Gould*, 475 U.S. at 287.

In our view, there is no reason to believe that the work preservation clause was motivated by labor regulatory goals. Seward's purpose in agreeing to the work preservation clause was not to regulate the labor relations of its contractors. As far as the record indicates, Seward's sole purpose was to ensure

harmonious industrial relations with its own electrical workers, who had traditionally performed the renovation work, since in this instance the city had to contract out the work because it did not have the necessary equipment to do the job. To be sure, the work preservation clause obligated the city to require the successful bidder to have a collective bargaining agreement with the IBEW covering this project. But the terms of the work preservation clause in the City's CBA with the IBEW were hammered out in the collective bargaining process. Like any work preservation clause, it was designed to provide a measure of economic protection for the employees of the City's electrical utility.

[4] On the face of it, the City of Seward, unlike the State of Wisconsin in *Gould* or the City of Los Angeles in *Golden State*, was not driven by regulatory concerns, but by legitimate management concerns that may lead any employer, public or private, to agree to a work preservation clause: striking a bargain with a union that represents its employees, maintaining harmonious relations with that union and its members, and avoiding industrial unrest in conducting its business affairs. Indeed, work preservation clauses such as the one at issue here are common in private sector collective bargaining agreements. *See, e.g., CCH, Union Contract Clauses* § 51,806.42, at 747.[2]

[5] We now turn to the question whether Congress intended to prohibit a public employer from requiring one of its contractors to have an agreement with the union that represents the public employers' employees who have traditionally performed the work being contracted out. We believe this question poses no difficulty because Congress has expressly placed public sector labor relations beyond the reach of the NLRA, and "Congressional purpose is of course 'the ultimate touchstone'

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[2] The Contractors do not dispute that the clause pursuant to which Seward acted would be a valid work preservation agreement if entered into by a private employer.

of preemption analysis." *Gould*, 475 U.S. at 290 (citations omitted). Congressional purpose vis-a-vis public employers is expressed in section 2(2) of the NLRA. That section exempts public employers from the definition of "employer" and consequently from the coverage of the Act. *See* 29 U.S.C. §152(2) ("When used in this subchapter . . . [t]he term 'employer' ... shall not include . . . any state or political subdivision thereof.") ("section 2(2)"); *see also Abood v. Detroit Board of Education, 431 U.S.* 209, 223 (1977) ("The National Labor Relations Act leaves regulation of the labor relations of state and local governments to the States."). In light of section 2(2), we fail to see how Congress could have intended to prohibit a public employee from agreeing to a work preservation clause to which a private employer is free to agree.

The Contractors rely heavily on *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Resources Authority*, 935 F.2d 345 (1st Cir. 1991) (en banc), *cert. granted*, 112 S. Ct.____ (1992) [hereinafter *"Boston Harbor"]*. In *Boston Harbor*, the First Circuit held that the NLRA preempted an attempt by the Massachusetts Water Resources Authority ("MWRA") to limit the bidding on the multi-billion dollar Boston Harbor clean-up project to contractors who agreed to sign a master collective bargaining agreement (drafted on behalf of the MWRA) with the Construction Trades Council and affiliated labor organizations. The Contractors argue that deciding this case in favor of Seward would conflict with *Boston Harbor*.

Boston Harbor does indeed share certain similarities with this case. In *Boston Harbor*, just as here, the state entity had a preexisting collective bargaining agreement with a union which required that all work done on a public project be awarded to contractors and subcontractors who agreed to sign a collective bargaining agreement with that union. The Contractors, however, overlook a crucial distinction between *Boston Harbor* and

this case. The MWRA in *Boston Harbor* did not act out of its concerns as a public employer; unlike the City of Seward, it did not employ workers who had traditionally performed work that would be contracted out.[3] Thus, the purpose of the union signatory requirement in *Boston Harbor* was not to preserve work traditionally performed by city employees. Here, by contrast, Seward is a public employer that has a collective bargaining agreement with the union representing its utility's electrical employees and the CBA defines the relevant bargaining unit broadly enough to cover the power line renovation work.[4] The union signatory requirement has been imposed to preserve work traditionally performed by members of the bargaining unit.

[6] As we have already noted, the fact that Seward acted in this case in its capacity as a public employer is crucial to the preemption analysis. Indeed, *Boston Harbor* itself makes clear

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[3] *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 370 (8th Cir. 1991), a case which followed *Boston Harbor*, is distinguishable for the same reason. The City of Minneapolis was not acting as a public employer since it did not own a public company and employ workers who traditionally performed the type of work at issue. Rather, Minneapolis, like the MWRA, was placed in charge of a project that required the *hiring* of workers, and in order to ensure smooth labor relations, it entered into a stability agreement with a specific union.

Because *Boston Harbor* and *Glenwood Bridge* are distinguishable, we need not take a position on the merits of those cases. *Boston Harbor* was decided by an *en banc* panel of the First Circuit that split 3-2; the *Glenwood Bridge* panel split 2-1. A petition for certiorari in *Boston Harbor is* currently pending before the Supreme Court.

[4] The work preservation clause did not extend beyond the bargaining unit. *See letter of Agreement Relating to Seward Inertie Project* ("[T]his provision is designed and intended to preserve work traditionally performed by employees represented by IBEW whose wages, hours, and conditions of employment are prescribed by this Agreement."). The stipulated facts show that Seward's own employees who are represented by the IBEW have done the work on major improvements to Seward's electrical system, including at least twenty different electrical transmission line projects in recent years. The stipulated facts also show that the renovation of the power line is directly

that NLRA preemption principles do not apply to an action by state or local government acting out of concerns it may have as a public employer. *Id.* at 354 ("Of course, if the MWRA were the actual employer of the Project laborers, the NLRA would be totally inapplicable as States are excluded from the definition of 'employer.'"). The fact that Seward will not be the actual employer of the workers on the line renovation project is irrelevant, so long as Seward acted in its capacity as a public employer in enforcing the terms of a valid work preservation clause in its CBA with the IBEW.

Were we to interpret the NLRA as prohibiting a municipality from fulfilling its obligations as a public employer under an otherwise valid work preservation clause in a public sector collective bargaining agreement, we would be paradoxically attributing to Congress the intent to impose more stringent labor regulations on public employers than on private employers. Such an interpretation of the NLRA would be at odds with Congress' command in section 2(2) that public sector labor relations be left unregulated by the federal government. It would indeed transform the preemption case law into a round-about way of redacting, at least partially, section 2(2) of the NLRA.

[7] In sum, we see no basis for attributing to Congress an intent to prohibit a public employer from using a work preservation clause as a bargaining chip in the collective bargaining process while allowing a private employer to do just that. Because Congress exempted public sector collective bargaining from the scope of the NLRA, we believe the decision whether to agree to and enforce a work preservation clause is "a task Congress intended to leave to the States." Gould 475 U.S. at 291. Accordingly, we hold that the NLRA does not preempt the

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related to the work done by Seward's employees, that is, the *maintenance* of the power line. It is not disputed that if Seward had had the heavy equipment necessary to undertake the project, it would have used its own utility employees to do the work.

City of Seward's actions requiring the successful bidder to have an agreement with the IBEW because the requirement was imposed pursuant to a valid work preservation clause in a collective bargaining agreement covering the city's electrical employees.

IV

The Contractors' second claim is that Seward's CBA with the IBEW violates the Sherman Antitrust Act, which broadly proscribes "every contract, combination in the form of trust or otherwise, in restraint of trade or commerce." 15 U.S.C. §1. The Contractors rely on cases which prohibit agreements between unions and non-labor organizations designed to reduce competition. *See, e.g., Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 622 (1975). The Contractors' reliance on these cases is misplaced because the Supreme Court has recognized a nonstatutory exemption from antitrust liability for collective bargaining agreements. *Id.*

[8] Relying on *Sun-Land Nursery v. Southern California District Council of Laborers,* 793 F.2d 1110 (9th Cir. 1986) (en banc), *cert. denied,* 479 U.S. 1090 (1987), Seward and the IBEW argue that a work preservation clause comes within the ambit of the non-statutory exemption to antitrust liability. In *Sun-Land,* we considered the applicability of the non-statutory exemption to construction industry collective bargaining agreements requiring subcontractors to be parties to a collective bargaining agreement with the union. Noting that Section 8(e) of the NLRA permits "hot cargo" agreements in the construction industry, we held that "a valid subcontracting clause contained in a collective bargaining agreement cannot serve as the basis for an antitrust claim" because "Congress would not have exempted the construction industry from the prohibition against 'hot cargo' clauses only to have such provisions create liability under antitrust laws." *Id.* at 1117. We recognize that, since the City of Seward is not an employer under section 2(2), neither

the general prohibition against hot cargo agreements nor the exemption in section 8(e) applies to it. Nonetheless, we find the reasoning in *Sun-Land* persuasive. Just as the employer and the union in *Sun-Land*, the City of Seward and the IBEW entered into an agreement permitted by law. It would be inconsistent to approve such an agreement under labor law, but strike it down under antitrust law. Accordingly, we hold that the Seward work preservation clause is immune from antitrust liability.[5]

V

[9] The Contractors further argue that Seward's enforcement of the terms of the work preservation clause violates the Equal Protection Clause of the Fourteenth Amendment because it constitutes state action favoring union contractors over non-union contractors. They then argue that the discrimination between these two groups is constitutionally infirm because it fails minimum rationality. We reject this argument. It is just as rational for a public employer to favor union contractors pursuant to a work preservation clause as it is for a private employer to do so. *See, e.g., Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1203 (2nd Cir. 1977) (holding that rational basis exists for city policy favoring union printers over non-union printers), *cert. denied*, 440 U.S. 979 (1979).

VI

[10] Finally, the Contractors argue that the City of Seward denied them due process of law when it agreed with the IBEW to add the work preservation clause to the CBA without giving the Contractors notice and an opportunity to be heard. This argument fails because as wishful bidders the Contractors have no constitutionally protected property interest in the city's

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[5] In the alternative, the City and the IBEW argue that the summary judgment on the antitrust claim can be affirmed on the basis of the governmental action exception to the Sherman Act. We need not reach this argument.

power line renovation project. *See Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 250 (2nd Cir. 1985) (the abstract need or desire to participate in public construction contracts does not constitute a property right protected by the Fourteenth Amendment).

The summary judgment in favor of appellees is AFFIRMED.

WRIGHT, Circuit Judge, dissenting:

With due respect to the views of my colleagues, I must dissent.

Although the majority's opinion is soundly reasoned, it rests on a faulty premise: that the City of Seward acted as a public employer when it conditioned bidding on its electrical project to those contractors who agreed to be union signatories. If it was acting as a public employer, it would be unnecessary to address the appellants' preemption argument. If the City actually employed the contractors' laborers, the NLRA would simply not apply because States are excluded from the NLRA's definition of employer. 29 U.S.C. §152(2); *see also Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Resources Authority*, 935 F.2d 345, 354 (1st Cir. 1991) (en banc), *cert. granted*, — S.Ct — (May 18, 1992) (No. 91-261) *[Boston Harbor]*.

As in *Boston Harbor*, indicia of an employer/employee relationship between the City and the contractors' laborers are not present here.[1] Not surprisingly, neither side in our case even argues that the City had an employment relationship with the

[1] In deciding that insufficient indicia of an employment relationship existed in *Boston Harbor*, the court considered the facts establishing whether an independent contracting relationship existed between the MWRA and its employees. It found that under the standard for determining independent contractor status, the relationship between the construction workers and the MWRA was a contractual, not an employment, relationship. It reached this conclusion by finding that the MWRA did not have the right to control the

laborers. Despite this lack of evidence, the majority maintains that, because the City's actions were motivated by its desire to maintain a harmonious relationship with its own employees, it may regulate the labor relations of other employers.[2] This can not be.

> As the *Boston Harbor* court noted:
>
> If the state employer exclusion from the NLRA were interpreted to include all situations in which a state contracted for goods or services, the exception would likely swallow up the rule.

Id. at 355. To allow the City to engage in regulation of other employers' labor relations would displace the NLRA. Taken to the extreme, the majority's state-as-employer argument could result in an anti-union state government permitting only non-union employers to bid on state projects. *See id.* Moreover, the majority's focus on the City's intent in adopting the work preservation clause would force the federal courts into an evaluation of local government motives, a seemingly impossible task and one which we have traditionally avoided. In short, when a State acts as a public employer, it should be bound to confine its regulatory function to its own current and future employees.

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laborers' performance, nor did it pay their salaries, provide pension or other benefits, or make FICA payments on their behalf. *Id.* at 355, n. 17.

Here, the parties did not have opportunity to explore the relationship between the City of Seward and its own employees to the extent that the *Boston Harbor* parties did. Because the majority fails to provide any evidence that the City acted as an employer here, it is hard to accept the conclusion that it did.

[2] Under normal circumstances, employers may not enter into pre-hire agreements. Congress made an exception for private employers in the construction industry. To allow a state entity, which cannot be an employer under the NLRA, to be considered an employer for purposes of this exception is "fancy judicial foot work at its nimblest." *Id.*

That a private employer could agree to a work preservation clause does not help the City here. Although the majority suggests that the rules are the same for public and private employers, the statute suggests otherwise. The *Boston Harbor* court explicitly rejected the appellees' argument that because the MWRA's action would be lawful under NLRA §§ 8(e) and (f) if the MWRA were a private employer, "there is no basis under the NLRA to treat a state more harshly than a comparably situated private party." *Id.*at 358.

The court declared that Congress is "perfectly capable of distinguishing between states and private parties" as it has done in sections 8(e) and (f). *Id.* In *Wisconsin Dept. of Indus. v. Gould, 475 U.S.* 282, 290 (1986), the Court explained why it is important to treat public and private employers differently:

> [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints.... The Act [NLRA] treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

The *Boston Harbor* court concluded that "it is plain that the private employer comparison merits little weight. The MWRA is an arm of the state, and its acts must be judged accordingly." *Boston Harbor,* 935 F.2d at 358.

The majority finds no support in sections 8(e) or (f) either. Those sections, which allow pre-hire agreements in the construction industry for private employers, are deafeningly silent as to permitted state regulation. *See Glenwood Bridge, Inc. v. City of Minneapolis, 940* F.2d 367, 371 (8th Cir. 1991) (holding that Sections 8(e) and (f) do not grant public employers the ability to enter into pre-hire agreements). In enacting the two sections, Congress occupied the field to the exclusion of local

regulations such as Specification 13.1 in *Boston Harbor*[3] and the work preservation clause here. *See Boston Harbor*, 935 F.2d at 357.

Were the City the employer, I would have little trouble agreeing with the majority's conclusions. I fail to see how the City's relationship with its own employees justifies its intrusion into the labor relationships between prospective contractors and their employees. I respectfully dissent.

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[3] Specification 13.1 in *Boston Harbor*, like the work preservation clause between the City and the IBEW, limited bidding on the MWRA's project to those contractors who agreed to hire only union laborers. The *Boston Harbor* court found that the NLRA preempted Specification 13.1 because it directly regulated the bargaining process. The court stated, "where interference into the collective bargaining process by the state is *direct*, an asserted state interest of the type at issue here, whether 'proprietary' or otherwise, cannot justify the interference." Id. at 359. As in *Boston Harbor*, our inquiry should focus on whether the City's action has the effect of regulating the collective bargaining process, rather than on what the City's motives were in agreeing to a work preservation clause.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATED BUILDERS AND CONTRACTORS, INC., et al.,

Plaintiffs-Appellants,

v.

CITY OF SEWARD, an Alaska own rule municipality; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Union 1547 (IBEW), a labor union,

Defendants-Appellees.

No. 91-35511

D.C. No. KCV-91-001-AJK

Filed July 24, 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals

ORDER

Before: WRIGHT, NORRIS, and HALL, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Norris and Hall have voted to reject the suggestion for a rehearing en banc, and Judge Wright has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Associated Builders and Contractors, Inc., a Maryland Corporation; Associated General Contractors of Alaska, an Alaska non-profit corporation; Irby Construction Company, a Mississippi Corporation; Irby/Alaska Utilities Construction Company, an Alaska corporation;

plaintiffs,

v.

City of Seward, an Alaska own rule municipality; and International Brotherhood of Electrical Workers, Local Union 1547 (IBEW), a labor union,

defendants.

Case No. A91-001 Civil

Filed March 20, 1991
United States District Court
District of Alaska

JUDGEMENT

By an oral decision at the conclusion of the hearing on March 19, 1991, the plaintiffs' motion for summary judgement was denied, and the defendants' motion for summary judgement was granted. The state law claims were dismissed without prejudice to them being filed again in state claim. [sic] The ERISA claim was withdrawn without prejudice to its being filed again.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs take nothing on their complaint, that it be dismissed on the merits, and that defendants take costs.

Andrew J. Kleinfeld, Judge

cc: O & J 4059
S. Ellis (DELANEY)
H. Antel (IBEW)
F. Arvidson (PERKINS)

March 19, 1991